Supreme Court, U.S.
FILED
SEP 29 2000
CLERK

No. 00-327

In The

Supreme Court of the United States

MARTIN H. TANKLEFF,

Petitioner,

v.

SUPERINTENDENT OF CLINTON CORRECTIONAL FACILITY, COMMISSIONER OF NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, AND ATTORNEY GENERAL OF NEW YORK,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL J. MILLER*
STEVEN A. HOVANI
Of Counsel to
JAMES M. CATTERSON, JR.
District Attorney of Suffolk County
Criminal Courts Building
200 Center Drive
Riverhead, New York 11901
(631) 852-2500

Attorneys for Respondents
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Whether certiorari should be granted when the Circuit Court scrupulously followed the dictate of *Oregon v. Elstad*, 270 U.S. 298 (1985), and decided that Tankleff's confession, given after he received *Miranda* warnings, was properly admitted at trial.

LIST OF PARTIES

The parties to the proceeding below were:

Martin H. Tankleff, Petitioner;

The Superintendent of Clinton Correctional Facility, Respondent;

The Commissioner, New York State Department of Correctional Services, Respondent; and

The Attorney General of the State of New York, Respondent.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

1. Statement of Facts 1

A. Pre-trial Hearings 1

B. The Trial Court's Hearing Decision Is Proven Correct By The Trial Testimony 4

C. The Evidence Presented At Trial 6

1. The Continuing Police Investigation/ Forensics 15

2. The Defendant's Case 20

3. The Verdict 21

REASONS FOR DENYING THE PETITION FOR CERTIORARI 21

1. There Is No Circuit Split Requiring This Court's Intervention 22

2. The *Dickerson* Decision Adds Nothing to the Analysis of This Case 25

CONCLUSION 29

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Caspari v. Bohlen, 510 U.S. 383 (1994) 28

Dickerson v. United States, ___ U.S. ___, 120 S.Ct. 2326 (2000) 1, 22, 25, 26, 27, 28

Griffith v. Kentucky, 479 U.S. 314 (1987) 27

Oregon v. Elstad, 470 U.S. 298 (1985) ..... *passim*

Sawyer v. Smith, 497 U.S. 227 (1990) 28

Stringer v. Black, 503 U.S. 222 (1992) 27

Tankleff v. Senkowski, 135 F.3d 235 (2d Cir. 1998) 23

Teague v. Lane, 489 U.S. 288 (1989) 27, 28

United States v. Byram, 145 F.3d 405, (1st Cir. 1998) 22

United States v. Carter, 884 F.2d 368 (8th Cir. 1989) .. 23, 24

United States v. Gale, 952 F.2d 1412 (D.C. Cir. 1992) 24

United States v. Gupta, 183 F.3d 615 (7th Cir. 1999) 25

United States v. Johnson, 816 F.2d 918 (3d Cir. 1987) 24

United States v. McCurdy, 40 F.3d 1111 (10th Cir. 1994) 24

United States v. Sangineto-Miranda, 859 F.2d 1501 (6th Cir. 1988) 25

STATE CASES

People v. Tankleff, 84 N.Y.2d 992 (1994) 27

People v. Yukl, 25 N.Y.S.2d 585, *cert. denied*, 400 U.S. 851 (1969) 2

STATEMENT OF THE CASE

The Circuit Court held that Tankleff made a brief statement while he was in custody, but before he received *Miranda* warnings. The Circuit Court then considered whether the circumstances surrounding the unwarned statement were so coercive that Tankleff could not knowingly and voluntarily waive his *Miranda* rights. The Circuit Court held that the questioning was not sufficiently coercive to irredeemably taint the second confession and that Tankleff did knowingly and voluntarily waive his *Miranda* rights before the second confession.

There is no basis to grant certiorari because the Circuit Court's decision scrupulously follows the dictate of *Oregon v. Elstad*, 470 U.S. 298 (1985). Furthermore, *Dickerson v. United States*, 120 S. Ct. 2326 (2000) has no impact on this case. Simply put, there is no circuit split which requires clarification by this Court.

1. Statement of Facts

A. Pre-trial Hearings

After Tankleff was indicted for murdering his adoptive parents a pre-trial hearing was held to test the admissibility of Tankleff's statements to the police. At the hearing the People called sixteen witnesses, including ten Suffolk County police officers, the Chief Constable of the Incorporated Village of Belle Terre, two Suffolk County Assistant District Attorneys, a civilian employee of the Suffolk County Police Department, and two other civilians. Two witnesses were called for the defense. At the conclusion of the hearing, and after both sides submitted a memorandum of law, the trial court, which obviously

had the opportunity to hear and see the witnesses and assess their credibility, issued a thirty-five page written decision (J.A. 1608-42)[1]. The trial court began its analysis by assessing the witnesses' credibility. The police witnesses were found to be frank, candid and trustworthy and their testimony was, " . . . marked by no substantial or serious inconsistencies or contradictions, and possessing the flavor of credibility" (J.A. 1610). The civilian witnesses were likewise found to be credible but Tankleff's sister – who was a defense witness – was somewhat unreliable because of her emotional involvement in the case (J.A. 1611). The other defense witness – Tankleff's "Uncle," Myron Fox (the family attorney) – was found to be wholly without candor, incredible and generally unworthy of belief (J.A. 1611).

The trial court reviewed the hearing evidence and the arguments made by defense counsel and found that Tankleff's confession was voluntarily made. First, custody was determined by what a "reasonable man, *innocent of any crime*, would have thought had he been in defendant's position." *People v. Yukl*, 25 N.Y.S.2d 585, 589, *cert. denied*, 400 U.S. 851 (1969) (J.A. 1635). Tankleff reported the attack on his parents and he was the "closest thing to a direct source of eyewitness information available to the investigators" (J.A. 1635). He was at the house where his parents were killed before, during and after the crimes

---

[1] Parenthetic numbers preceded by "J.A." refer to the pages of the Joint Appendix filed in the Second Circuit. Parenthetic numbers preceded by "H" and "Tr." refer to the hearing and trial transcripts; "R.S.A." refers to Responent's Supplemental Appendix in the Appellate Division of the New York Supreme Court; "A" refers to the Appendix in the state appellate courts.

were committed and Tankleff agreed to cooperate with the police (J.A. 1635-36). Because of Tankleff's status as a witness, and because the police had acted properly, the trial court held that Tankleff was not in custody until he implicated himself in the crimes.

Second, there was no attempt to isolate Tankleff from his family or Myron Fox. When Tankleff was brought to police headquarters in Yaphank, his family, Fox and a family friend and the mayor of Belle Terre, Vincent Bove, were all told that Tankleff was being brought there. Indeed, Tankleff's brother-in-law, Ronald Rother, was given directions to headquarters but he decided to remain at the hospital with Tankleff's critically injured father (J.A. 1621-22, 1636).

Third, there was no evidence of physical or psychological coercion and Tankleff was advised of his *Miranda* rights shortly before he confessed (J.A. 1636-37). Fourth, Tankleff's age was not a consideration because he was a relatively sophisticated, above average high school student who was preparing to apply to college at the time of these crimes (J.A. 1637). Based on the facts at the hearing, the trial court found that Tankleff was not in custody until 11:54 a.m., when he started to inculpate himself (J.A. 1636). Finally, the trial court held that Tankleff's statements were made voluntarily (J.A. 1637).

The trial court's suppression hearing decision was affirmed both by the Appellate Division and New York Court of Appeals. Similarly, the Federal District and Circuit Courts held that a writ of habeas corpus should not issue. The only disagreement relevant here is that the

Circuit Court thought that custody occurred about nine minutes earlier than the time fixed by the trial court.

B. The Trial Court's Hearing Decision Is Proven Correct By The Trial Testimony[2]

In New York the question whether a confession is voluntary is submitted to the jury even though the issue is first considered at the pre-trial hearing. The trial testimony showed that Tankleff was free to move about his house and talk to his neighbors before he left for Yaphank. The police conduct at Yaphank – as being calm and accommodating – was confirmed by Tankleff himself. Finally, the thorough police investigation belies any claim, such as in the SIC report, that the investigation in this case was anything less than professional.

First, petitioner seemingly argues that he was in custody and interrogated from virtually the moment the police answered his call for help. When the police first arrived at the crime scene, the two police officers, Tankleff and Tankleff's neighbor, Morton Hova, went into the house. When Tankleff left the house to wait for the ambulance to arrive, Hova also exited. From 6:15 a.m. until 8:40 a.m. Tankleff spoke with a neighbor, John McNamara, on three different occasions and each time he refined his story to McNamara. He waited for the ambulance to arrive and directed the emergency personnel to his parents. He spoke with a friend, using the kitchen telephone, and with a classmate outside of his home. Tankleff spoke with Belle Terre Mayor Vincent Bove and Chief Constable

---

[2] These facts are culled from Part C, *infra*.

Hines (Tankleff's father had been the Belle Terre Police Commissioner). During this time (about 8:10 to 8:30 a.m.), Tankleff was photographed by a newspaper photographer casually speaking with the police detectives.

The story Tankleff told both the police and his neighbors was that he had come home from the mall on the night preceding the murders and had gone to bed at about 11:15 p.m. He awoke the next morning to find his mother dead and his father in critical condition. He suspected Jerry Steuerman, a business partner of his father, because Steuerman owed his father a lot of money. Then Tankleff added one additional fact – that Steuerman was the last person to leave the card game held on the night/morning of the murder. The card game ended at 3:00 a.m. and Tankleff never explained how he could both be asleep and report that Steuerman was the last person to leave the card game!

Second, Tankleff's trial testimony largely confirmed the police testimony at police headquarters. While he conceded that he confessed to the police that he had committed the murders, he told the jury that he had nothing to do with the crimes since he loved his parents. He agreed that he told the detectives that he killed his mother and father using a knife and barbell, but he maintained that the police had him believing that he killed his parents and he told them what they wanted to hear. Tankleff admitted that his conversation with the detectives at Yaphank was not confrontational until he demonstrated how he moved his father. He testified that he admitted to using the dumbbells because it would make it easy to fill out the story and that he simply said "Yeah" when he was asked if he had wiped the knife

clean. Further, he conceded that he had been apprised of his rights with a rights card, which he signed, and that he had made three diagrams for the police.

Third, Tankleff suggested both that his confession was involuntary and obtained through questionable police tactics and that the forensic investigation disproves his confession. The two statements are inherently contradictory. Tankleff confessed before noon on the day he killed his parents, but the processing of the home lasted for several days after the crime. Any idea that Tankleff was railroaded is disproved by the continuing police investigation. That investigation was conducted with full knowledge of Tankleff's confession but there was no attempt to incorrectly verify the information Tankleff provided.

C. The Evidence Presented At Trial

At 6:11 a.m. on September 7, 1988, seventeen year old Martin Tankleff called the 911 operator to report that his father was "bleeding" and was in need of medical attention at their home at 33 Seaside Drive in Belle Terre, Suffolk County, New York (J.A. 1892-95). The Emergency Services Operator, Patricia Flanigan, gave instructions to the "excited" but "not upset" Tankleff to lay his father down on the floor, and after elevating his feet with a pillow, apply pressure to the wound with a clean towel (J.A. 1895-96; see People's Exhibit 3, tape recording of 911 call, Court Exhibit 1, transcript of 911 call reprinted in Appellee's Appellate Division Supplemental Appendix [R.S.A.] 71).

Morton Hova, the Tankleffs' next door neighbor who lived at 29 Seaside Drive in Belle Terre, heard someone screaming outside his home, "Help!" (J.A. 1897-98), and saw petitioner, wearing short pants and a sweatshirt and bare-foot (J.A. 1899, Tr. 103-04). Hova also saw Police Officer Gallagher, followed by Police Officer Crayne, pulling up in the Tankleff driveway in their patrol cars. Tankleff led the police and Hova into the home, directing Officer Gallagher to the body of Arlene Tankleff and leading Officer Crayne to where Seymour Tankleff was located – on the floor with his clothes saturated with blood (J.A. 19-22, 29-33, 35-37, 160-62; Tr. 257-58, 333-35). Arlene Tankleff lay dead on the floor with a very deep, gashing wound to the neck (J.A. 20, H. 21-23, 47-49, 81-82, Tr. 264-66, 298-300).

When Officer Gallagher asked Tankleff what had happened, he responded that he had gotten up to go to school and found the lights on and the alarm off and that "only one person could have done this – Jerry Steuerman" (J.A. 25, H. 54-56, Tr. 275-76). Petitioner also said to Hova that the crime had been committed by "My father's partner . . . Jerry, Jerry" (J.A. 1900). Petitioner also told John McNamara, who happened by, that Jerry Steuerman had killed his parents. Later, Tankleff told Constable Hines that Steuerman had killed his parents and that Steuerman was the last person to leave the card game; by all accounts the card game ended at three in the morning (A. 255, 282, 2623-24, 2641-42).

When members of the Port Jefferson Volunteer Ambulance Corp. arrived at the home (Tr. 416-22), they tended to Arlene Tankleff and ascertained that she had no pulse in her wrists or neck, was covered with large

amounts of blood and that her eyes were open (Tr. 425-27). Shortly thereafter, Tankleff's brother-in-law, Ronald Rother, arrived at the scene (H. 198, Tr. 278-80, 383). Tankleff also spoke on the telephone with his friend Mark Perrone and told Perrone what had happened and that he would not be going to school that day (A. 201-02, 2508-09).

During this time, petitioner walked without restriction about the exterior of his home and eventually went to stand in the street near Mr. McNamara. He again told Mr. McNamara that "Jerry Steuerman murdered . . . [my] parents." This time, however, Tankleff added "a little more," peculiarly noting that he had slept in the nude, that when he awoke he put on shorts and a sweatshirt and also that he went to look for his mother in the garage before he called 911 (Tr. 783-84, 812).

At approximately 6:42 the ambulance left to take Seymour Tankleff to nearby Mather Hospital (J.A. 44-45, Tr. 280, 388, 458-60).

Homicide Detective McCready arrived at the scene at approximately 7:39 a.m. (J.A. 126-27, Tr. 517, 3431-32). After looking around inside the Tankleff house for about ten minutes, McCready found Tankleff and asked if he would accompany him to his parked car for an interview – which took a few minutes (J.A. 131-32, 609-10, 2239-40; see also J.A. 134, 144-45, Tr. 3436-37). After speaking for about five minutes, Detective McCready asked if petitioner would remain in the car while he returned to the home (J.A. 147).

Inside once again, McCready observed that there was blood spatter on the phone in the office room, but that,

inexplicably, there was no blood on the garage door handle which Tankleff claimed he had touched after giving "first aid" to his father when he was searching for his mother (J.A. 147-50, 2245-48, 2250-51, Tr. 3445-48). McCready also confirmed that the drapes in the master bedroom were open, the television was on, and, notwithstanding Tankleff's claim that the room was dark and that he could not see anyone inside, the room in fact was well illuminated, so that one "could see plainly" through the entire length of the room (J.A. 150-51, Tr. 3446-48). Finally, no blood was discovered on the kitchen telephone supposedly used for the Shari Rother and Perrone conversations or in the linen closet area where petitioner claimed he obtained a towel for his father (J.A. 151, 4936-37). McCready also returned to petitioner's bedroom and again verified that the light switch (which was in an "on" position) and wall had a blood smear (J.A. 153-54, 2252-53).

Detective McCready exited the Tankleff home after completing his second inspection, and was joined at approximately 8:00 a.m. by his immediate supervisor, Suffolk County Police Department Homicide Detective Sergeant Robert Doyle (J.A. 153, 910-12, Tr. 2609-12). McCready told petitioner, "Marty, this is my Sergeant. Tell him everything you've been telling me" (J.A. 153, 912-13, 2151, Tr. 2611, 3451-52) – which he did (J.A. 153-57, 918-22, 925, 980-86, Tr. 2615-20, 2832-37, 3452-54, 3536-37, H. 989).

The detectives concluded that Tankleff's story was inconsistent and that it warranted further inquiry especially since Tankleff insisted that he knew who had attacked his parents. Doyle, therefore, told McCready to

ask Tankleff if he would accompany them to Police Headquarters in Yaphank to discuss the case further (J.A. 163, 914-15, 2159-60, 3456-57, Tr. 2627). When asked by McCready if he would "take a ride with me out to police headquarters" to discuss the matter further (to "find out more about what happened, more about Jerry Steuerman"), petitioner said "fine" and moved from the hood of the car to the right front passenger seat of McCready's vehicle (J.A. 163-64, 38, 255, 2287-87, Tr. 3463).

Detective McCready and Tankleff arrived at police department headquarters in Yaphank at approximately 9:20 a.m. Discussions commenced in the Squad's interview room at 9:40 a.m. once Detective Rein joined Detective McCready.

At approximately 11:15 a.m., petitioner was asked to demonstrate how he helped his father by moving him from the chair to the floor in his office (J.A. 205, 948-49, 1232, 2173-74). As he positioned himself with Detective Rein by attempting to pull him off his chair in the interview room, Detective McCready observed that there was a blood spot on Tankleff's exposed shoulder which was revealed by the movement of his sweatshirt in this activity (J.A. 214, 950-51, 1232-33, 2174-76, 2260-62). Petitioner was asked how this could be, and answered that he showered only the previous night, but he had not done so again in the morning (J.A. 214-15, 1234, Tr. 2176-77).

Tankleff was asked to review the story again, which he did (J.A. 214-16, 1240-41, Tr. 2262-63, 2873-74, 3476-77). As to how his sweatshirt would not have any blood on it if he moved his father in the manner in which he described, Tankleff thereupon modified his story. He now

suggested that he, in fact, had rolled up the sleeves of his sweatshirt and that was how the blood was found on his shoulder (J.A. 217-18, 954, 1243-45, 2177A-1278). With this explanation, Detective McCready, who was seated on the desk, leaned forward and said in a matter of fact tone that that was "ridiculous and unbelievably absurd" (J.A. 219-21, 1250-53, 2178-79, Tr. 3479). Petitioner responded with a third version, that "[m]aybe I put my sweatshirt on after I gave first aid to my father" (J.A. 956-57, 1250-53, 2178, 2265).

Another version of what happened emerged, this time Tankleff stating that perhaps he woke up with the towel he had around his waist when he went to sleep still on (J.A. 954, 957). Petitioner agreed that that was what happened (J.A. 957). He could not then explain, however, why it was that he did not use his own towel which he had around him to help his father (J.A. 957). He responded that this was because the 911 operator told him only to use a clean towel (J.A. 224, 957-58, Tr. 2879-81). He also maintained that he could see that his mother's throat had been cut from where he stood in the doorway of the master bedroom when he returned to that location after calling the 911 operator (J.A. 230, Tr. 2872-73). At approximately 11:45 a.m. he was requested to provide a third diagram of the position of his mother's body as it was located in the master bedroom. He did so, adding two straight lines to his drawing, one horizontal showing how far into the room he ventured and the other vertical showing where he claimed he saw that her throat was cut (J.A. 230-31, 960-61; see People's Hearing Exhibit 16; People's Trial Exhibit 169; R.S.A. 96; but see also

R.S.A. 74-76 [crime scene photographs] which clearly reflect that this injury was *not* visible from the doorway).

Thereafter, Detective McCready left the interview room and proceeded to pretend to be speaking to Detective Pfalzgraf. In a voice loud enough to be overheard by Detective Rein who was still in the interview room with Tankleff, McCready was heard to say, "Yeah, John, yeah. You're kidding. No kidding, he came out? Okay. Thanks a lot" (J.A. 233-36, 961, 2266-67). When Detective McCready returned to the interview room, he advised petitioner that he had just learned from Detective Pfalzgraf, who was at the hospital, that they had "pumped his father full of adrenaline," that he had "come out of the coma" and said that he [petitioner] had done this to him (J.A. 235-36, 1291-93, 2186-87, 2266-68). Petitioner immediately responded that "If my father said that, that's because I'm the last person he saw" (J.A. 236, 962, 1296, 2186, 2268). Detective Rein asked Tankleff if his father was conscious when he gave him first aid or was he referring to when he beat and stabbed him. Petitioner was quiet for about ten seconds and then offered to take a lie detector test. He was told that none would be given (J.A. 237, 962, 1300, 2186).

Detective Rein then asked petitioner, "What should we do with the person who did this to your parents?" Tankleff responded, "Whoever did this needs psychological help." Petitioner continued by asking, "Could I have blacked out?" "Maybe another Martin Tankleff did this. Could I be possessed?" (J.A. 238-39, 962, 1300-03, 2181-87, 2268-69). Immediately thereafter, at 11:54 a.m., with no further questioning, petitioner stated, "It's starting to

come to me." He was immediately interrupted by Detective McCready, who asked petitioner whether he knew he was in police headquarters and speaking to two homicide detectives (J.A. 238-39, 963, 1303, 2187, 2269-70). Petitioner confirmed that he was indeed aware of this (J.A. 239-40, 963, 2187).

Tankleff was then advised of his *Miranda* rights by Detective McCready who read them to him from a card. Petitioner signed and dated the rights card (J.A. 240, 963, 1305-06, 2186-88, 2269-70) People's Hearing Exhibit 17; People's Trial Exhibit 70; R.S.A. 97, 98). After he affirmatively waived his rights and stated that he would speak to the detectives without an attorney present, Detective McCready asked him to tell them what happened. Tankleff responded, "I need psychiatric help" (J.A. 240-46, 967, 1305-06, Tr. 2912-13). When asked whether he knew what had happened, Tankleff responded, "I know what happened, but it feels like it was somebody else, another person who was inside of me who did this" (J.A. 246).

Detective McCready asked, "What happened? Just tell us what happened with your mother and father" (J.A. 246, 966-67, 2191-92, 2271-72). Petitioner, who related that he had been caught up in the middle of a disputatious relationship between his mother and father, again said, "I'll tell you what happened. What do you want to know." Detective McCready asked, "Did you kill your mother and did you hurt your father?" Tankleff responded, "Yeah, I did it," and then detailed what he had done and why (J.A. 245-46, 967-68, 1313, 2191-2271; see also, J.A. 247-48, 968-74, 1310-13, 2271-76). When Detective Sergeant Horvath of the Homicide Squad knocked on the door and advised Detective McCready

that an attorney by the name of Myron Fox had just called with a request that the police should not speak to Tankleff "any longer" (J.A. 276, 976-77, 2198, 2278, Tr. 3363-64), sometime after 1:00 p.m., the interview stopped. See People's Hearing Exhibit 19; People's Trial Exhibit 172 (I.D. only); R.S.A. 100-02.

Suffolk County Deputy Medical Examiner, Dr. Vernard Adams, arrived at the crime scene at approximately 4:00 p.m. on September 7, 1988. He immediately proceeded to the master bedroom where Arlene Tankleff's body lay and observed blood smears near the bed and a pool of blood near Mrs. Tankleff's head and neck (Tr. 3940-42). A "large cut" to the neck was readily visible. Blunt force injuries to the head were discovered only upon palpation of the head by the Medical Examiner. The head injuries were determined to have been inflicted before the incised wounds (Tr. 3942-44, 4004-05).

An autopsy the next day, September 8th, revealed that aside from the severe neck incision previously noted, Arlene Tankleff suffered four stab wounds in the left side of her back. There were also a completely perforating stab wound to the right forearm and an incised wound to the left forearm, both "defensive in nature" (Tr. 3945-46, 4005-08). These wounds were consistent with being caused by the sharp blade of a knife (Tr. 3953-54). There were eleven additional scalp lacerations, severe blunt impact injuries to the head (which were curvilinear and stellate or star-like), along with two depressed fractures to the skull. These injuries were consistent with being caused by a blunt instrument, specifically, the barbells found in petitioner's room (Tr. 3956-57, 3962-65, 3768, 3974-75, 4009); see People's Trial Exhibits 93, 181-3; R.S.A.

85, 105-07). Dr. Adams determined the primary cause of death for Mrs. Tankleff to have been the severing of two major arteries in her neck. The multiple blunt impact head injuries enumerated were not determined to have necessarily been a primary cause, but a contributing cause (Tr. 3955-56, 3977-78).

The Medical Examiner also testified that Seymour Tankleff arrived at Mather Memorial Hospital at approximately 6:50 a.m. on September 7, 1988, suffering from incised wounds, a depressed skull fracture, with his brain oozing out and incised neck wounds (Tr. 3984-85). He never regained consciousness and was subsequently transferred on September 7th to the State University of New York at Stony Brook's Medical Center (Tr. 3984-85). He underwent several medical procedures and remained there in a coma until October 6th, when he died (Tr. 3985-88). The autopsy conducted on Seymour Tankleff on October 7, 1988 revealed that he had suffered at least five separate head blows from a blunt instrument, along with severe wounds to his neck (Tr. 3997-99). The cause of death was determined by Dr. Adams to have been a combination of primary blunt impact head wounds and incised wounds to his neck (Tr. 3999-4000).

1. The Continuing Police Investigation/Forensics

Members of the Suffolk County Police Department's Identification Section, along with the Medical Examiner's Criminalistics Laboratory, engaged in extensive, investigative processing of the Tankleff home in the days following the murders. Initial inspection of the scene on September 7, 1988, resulted in the discovery of a set of

barbells in petitioner's bedroom, (see People's Trial Exhibit 93; R.S.A. 85) and of the fact that there was moisture still present in the shower area of petitioner's bathtub; in particular, there were droplets under the faucet and drain area with the sponge found therein still moist. The crime scene was videotaped beginning at 10:08 a.m. (Tr. 1288-98).

An examination by Suffolk County Medical Examiner's Criminalistic Laboratory expert Detective Charles Kosciuk of the desk and walls of the office area where Seymour Tankleff was found resulted in the discovery of blood spattering and cast off material which was consistent with the use of a blunt or bludgeoning instrument (Tr. 1650-52). This was particularly apparent with the appearance of medium and low velocity blood spatter in this area (Tr. 1651-52). Cast-off blood, separately considered, radiated from the top area of the chair where Seymour Tankleff was originally seated and was consistent with the use of a raised instrument which was utilized in a north to a south direction with at least a single blow (Tr. 1665-68). Further spattering around the desk area indicated that a minimum of four blows occurred, one in a north-south direction, two east to west with at least one blow causing the initial bleeding which resulted in the cast-off and spatter. (Tr. 1648-67, 1669-72, 1838). Of particular interest was the observation of the office's telephone which had a dangling telephone cord *with undisturbed blood spatter* (Tr. 1654-55, 1661); see People's Trial Exhibit 74G; R.S.A. 82).

The examination of a bloody clump of four hairs found on Seymour Tankleff's desk (see People's Trial

Exhibit 65; R.S.A. 81), however, revealed they were consistent with Arlene Tankleff's hair and inconsistent with the other known samples (Tr. 1978, 2007-08, 2049).

Blood and genetic marker analysis conducted by Robert Baumann, a forensic scientist and serologist also with the Criminalistics Laboratory, indicated the presence of a blood stain on the switch plate of petitioner's bedroom (see People's Trial Exhibit 91; R.S.A. 84) which, on comparison with known samples from petitioner, Seymour Tankleff, Arlene Tankleff and Jerry Steuerman, was consistent only with Arlene Tankleff or petitioner (Tr. 2273-75). Moreover, swabbings which were taken from petitioner's right shoulder (see People's Trial Exhibit 150; R.S.A. 87) were determined to have been consistent with that of Seymour Tankleff (Tr. 2267). Further, an analysis of the many blood stains found on the fitted sheets in the master bedroom revealed the presence not only of Arlene Tankleff's blood, but the presence of one stain of Seymour Tankleff's blood (Tr. 2178-83). Additionally, an examination of the blood stain found on the master bedroom's east wall also revealed the presence of blood consistent with Seymour Tankleff's and inconsistent with the other knowns (Tr. 2176-77).

The 12 inch by 3 inch sponge, recovered damp from petitioner's bathtub area, had a "very sharply defined, very straight" cut (as opposed to being broken apart by use) approximately five millimeters deep (Tr. 2225; see People's Trial Exhibit 88; R.S.A. 83). Further, an examination of the three tissues found in petitioner's possession after his arrest revealed that one was negative for the presence of blood and one had blood consistent with petitioner's (Tr. 2277); however, a third wadded-up tissue

was consistent *only* with Arlene Tankleff's blood (Tr. 2277-78, 2338-41).[3]

Finally, the red towel found on petitioner's bed which was "wet to the touch" when detectives first arrived at the home, revealed the presence of Seymour Tankleff's blood (Tr. 1733, 1775, 2258-61, 2343-44).

A detailed examination of the bed sheets and comforter found in Arlene Tankleff's bedroom, along with the blood smears found on petitioner's bedroom wall and switch plate, ultimately revealed the existence of a chain link pattern which was consistent with a honey-combed pattern found in the grip or palm area of gloves made of fabric, rubber or latex material. This pattern was, moreover, determined to have been more likely consistent with a rubber house-type glove, such that there was a reasonable scientific certainty that one was used during the course of these murders (Tr. 2455-60, 2473). Analysis of the glove imprint blood smears on petitioner's bedroom switch plate wall revealed that they were consistent only with his own or Arlene Tankleff's blood, to the exclusion of the other known samples (Tr. 2274-75, 2459-61).[4]

---

[3] Petitioner had, of course, affirmatively stated to the detectives that he had never touched or even gone near his mother's body.

[4] The patterns discovered in the master bedroom were in blood determined to be consistent with Arlene Tankleff to the exclusion of appellant and all other knowns (Tr. 2269), which gave rise to the inference that the blood on petitioner's wall with the same pattern was Arlene Tankleff's and not petitioner's.

The police investigation also focused on Tankleff's activities on the day preceding the murders, as well as with his conduct and relationship with his parents during the previous summer. As such, two of petitioner's friends, sixteen year old Audra Goldschmidt, and her sister, Stacey Goldschmidt, age seventeen, along with Danielle Makrides, related an August 27, 1988 conversation with petitioner while he was in their home, in which he stated that if he could "have a hit" on both his parents, he then would be able to get any car he wanted (Tr. 141, 168-69, 172-73, 202). This statement was echoed by Tankleff when he called Audra on October 13, 1988, subsequent to his arrest, and stated that once he inherits all his parents' money, he would be able to take Audra and her sister out in a limousine (Tr. 171-72, 194-95).

Petitioner also shared his annoyance over his parents' insistence that he drive a 1977 blue Lincoln Town Car, which he called a "piece of shit", during the summer in a conversation with a friend named Lance Kirchner, who recalled that at about that time petitioner said to him that "if his parents weren't alive, he'd be able to get anything he wanted" (Tr. 597). Petitioner's difficulties with his father also were apparent on Labor Day, September 4, 1988, during a visit with his father to one of Seymour Tankleff's bagel stores, Strathmore Bagels in Port Jefferson Station. Seymour Tankleff demanded that they both leave immediately and stated that he did not have time to "fucking bull shit," after which he stormed out screaming (Tr. 595-96, 613-14). Tankleff just put his head down and walked out, while his father continued to yell at him (Tr. 614-15).

2. The Defendant's Case

The petitioner's case at trial consisted of his own testimony, along with that of several friends and neighbors, and certain expert testimony relating to stress, trauma and sound analysis. Petitioner, testifying in his own defense, stated to the jury that he "absolutely" did not kill his mother and father since he "loved them" both "very much" (J.A. 2343-44). While he conceded that he confessed to the police that he had committed the murders, he also maintained that he had nothing to do with this since he loved his parents (J.A. 2358, Tr. 4153-55).

Petitioner directly testified to the jury that *he, in fact, confessed to Detective Rein and Detective McCready that he killed his mother and attacked his father with a knife and barbell* (Tr. 4239-40). He maintained, however, that the reason he admitted to killing his parents with the watermelon knife and dumbbells was "they had me believing I did it and *that's what they wanted to hear*" (emphasis supplied) (J.A. 2359). In so doing however, he conceded that his conversation with the detectives at Yaphank was not confrontational until his demonstration with Detective Rein (Tr. 4238), and testified that he admitted to using the dumbbells because it would "make it easy" to fill out the story and that he simply said, "Yeah" when he was asked if he had wiped the knife clean (Tr. 4160-61). Further, he conceded that he had been apprised of his rights with a rights card, which he signed after Detective McCready "received" the feigned telephone call, and that he had made three diagrams for the police (Tr. 4164, 4190). Indeed, he related that notwithstanding that he did not have his eyeglasses or contact lenses on that day, he

had no trouble drawing the three diagrams for the detectives (Tr. 4189-91). Petitioner testified that he was simply "in shock" when he discovered his parents in the home during the early morning hours of September 7, 1988 (Tr. 4203-04), but "I had nothing to do with this" (J.A. 2360, 2363).

Dr. Herbert Spiegel, a psychiatrist and psychoanalyst, testified at trial as an expert in reaction stress that traumatic neurosis can create an acute traumatic state, rendering an individual's judgment to be suspended in a "zombie-like" atmosphere (Tr. 4269-81). Simply stated, Dr. Spiegel assumed (and admitted) that petitioner did, in fact, confess to the police, but insisted that that confession was the essence of the product of tense, psychological stress, and was caused by "brainwashing" (Tr. 4305-07).

3. The Verdict

Petitioner was convicted of the crimes of Intentional Murder with respect to his father, Seymour Tankleff, and Depraved Indifference Murder with respect to his mother, Arlene Tankleff (Tr. 5138-41). Petitioner was sentenced on October 23, 1990, to two consecutive, indeterminate terms of twenty-five (25) years to life imprisonment.

REASONS FOR DENYING THE PETITION FOR CERTIORARI

The petition for a writ of certiorari should be denied. There is no circuit split which warrants this Court's intervention and the Circuit Court scrupulously followed the

decision in *Oregon v. Elstad, supra.* Furthermore, the recent decision in *Dickerson v. United States,* ___ U.S. ___, 120 S.Ct. 2326 (2000) adds nothing to the analysis of this case.

1. There Is No Circuit Split Requiring This Court's Intervention.

In *Elstad,* this Court found a voluntary statement given after *Miranda* warnings admissible, despite the existence of a prior, unwarned but voluntary statement, holding

> "that a suspect who has once responded to unwarned, yet uncoerced questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings." *Id,* 480 U.S. at 318.

The supposed "deep split" among the Circuit Courts of Appeals in applying this ruling is chimerical. Petitioner's own review of these assertedly "strikingly inconsistent" holdings reveals a rather integrated approach differentiated largely by the disparity of the facts of the underlying cases.

The lynchpin of petitioner's argument is the statement – *in dicta* – by one panel of the First Circuit that its view of the holding of *Elstad* was "highly tentative in the absence of more guidance" from this Court. *United States v. Byram,* 145 F.3d 405, 409 (1st Cir. 1998). The *holding* of *Byram,* however, was "that *Elstad* is distinguishable on its facts . . . " (*Id.,* at 410) since Byram's first statement was not clearly voluntary and the second statement was *not* preceded by *Miranda* warnings. The *Byram* court also

incorrectly attributed to the Second Circuit the "view that *Elstad* is the end of any use of the fruits doctrine based on *Miranda* violation." Actually, the court below "stressed the fact-specific nature of these sorts of determinations." *Tankleff v. Senkowski*, 135 F.3d 235, 245 (2d Cir. 1998).

Petitioner erroneously consigns the holding of *United States v. Carter*, 884 F.2d 368 (8th Cir. 1989) to the other end of the *Elstad* spectrum. In *Carter*, postal inspectors interviewed defendant concerning the disappearance of bills and bearer checks from a South Dakota bank. During the course of the interview, the inspectors asked Carter if they could look in his wallet. When Carter complied, the agents discovered $63.00 in cash and a bearer check, which had been marked before being placed in the mail trays from which they had been taken. The agents' explanation of the inculpatory nature of these items prompted Carter to make incriminating statements. At that point, Carter was given his *Miranda* warnings; he then wrote out a handwritten statement admitting his guilt.

The *Carter* court correctly distinguished *Elstad* because this Court "gave no indication that it intended to give a green light to law enforcement officers to ignore the requirements of *Miranda* until *after* such time as they are able to secure confession" (*Id*, 884 F.2d at 373). More significantly, however, the court also based its suppression of defendant's second confession on the alternative ground that it was the fruit of an unconstitutional search. *Id.*, at 374. The facts in Tankleff's case certainly do not establish the type of "end run around *Miranda*" that animated the holding of *Carter*. *Id.*, at 373.

The narrow holding of *United States v. McCurdy*, 40 F.3d 1111 (10th Cir. 1994) was that the District Court had erred in granting defendant's motion to suppress his warned statement solely because interrogating officers had earlier violated *Miranda* by questioning McCurdy without first advising him of his rights. *Id.*, at 1117. The mere fact that the Court also distinguished the holding of *Carter* on the basis of the relative timing on the two statements certainly evinced no confusion on the court's part concerning the scope of *Elstad*.

Similarly, in *United States v. Gale*, 952 F.2d 1412 (D.C. Cir. 1992), the court focused on concern about legitimizing "end runs" around *Miranda* in distinguishing the holding of *Carter*. Specifically, the *Gale* Court noted that the officer interrogating defendant "did not 'get practically all [he] wanted out of' appellant before administering *Miranda* warnings. He asked only one improper question . . . " *Id.*, at 1418.

The holdings of the cases from the other eight Circuits cited by petitioner do not exhibit the inflexibility he attributes to them (Brief, at 23). They simply reflect appropriate deference to this Court's pronouncement, under circumstances deemed sufficiently congruent to the facts of *Elstad*. For instance, in *United States v. Johnson*, 816 F.2d 918, 922 (3d Cir. 1987) the court observed that this "Court held . . . that a suspect's subsequent choice to waive his or her rights after a proper administration of *Miranda* warnings should *ordinarily* suffice to dissipate the coercive impact of the earlier confession . . . " (emphasis added)

Similarly, holdings that *Elstad may* permit a later warned confession to be utilized if an earlier unwarned confession was uncoerced [*United States v. Gupta*, 183 F.3d 615, 616 (7th Cir. 1999)] or that such a later confession *"may be admissible"* [*United States v. Sangineto-Miranda*, 859 F.2d 1501, 1517 (6th Cir. 1988)] (emphasis added) do not establish adherence to an immutable rule, posited as evidence of a split among circuits.

2. The *Dickerson* Decision Adds Nothing to the Analysis of This Case.

According to petitioner the decision in *Dickerson v. United States*, ___ U.S. ___, 120 S.Ct. 2326 (2000), adds greater weight to his certiorari request. He reasons, based on Justice Scalia's dissent, that since *Dickerson* established that *Miranda* warnings are constitutionally required the landscape of *Miranda's* progeny – including *Oregon v. Elstad*, 470 U.S. 298 (1985) – has been drastically altered. *Dickerson*, however, iterates that the law since *Miranda* was decided is that the prescribed warnings are constitutionally required. This understanding was, therefore, part and parcel of the subsequent decisions interpreting and applying *Miranda*. Alternatively, if Justice Scalia's view were to prevail, then *Dickerson* would announce a new rule of constitutional law which would be inapplicable to this case on collateral habeas corpus review.

In *Dickerson*, the Court held that *Miranda* was a constitutional decision which could not be overruled by an Act of Congress. The Court reasoned that since it held no supervisory power over the state courts *Miranda* had to be constitutionally required in order for the Court to

mandate state adherence to the decision. *Dickerson*, 120 S.Ct. at 2332-33. Furthermore, the *Miranda* decision was replete with statements indicating that the *Miranda* majority thought they were announcing a constitutional rule. *Dickerson*, 120 S.Ct. at 2334. Finally, the *Miranda* court required that any legislative alternative to the warnings had to be at least equally effective in preventing coerced confessions. *Dickerson*, 120 S.Ct. at 2334. Indeed the conclusion is inescapable that *Miranda* warnings have been constitutionally required since the *Miranda* decision was announced:

> But we need not go farther than *Miranda* to decide this case . . .
>
> * * *
>
> In sum, we conclude that *Miranda* announced a constitutional rule . . . *Dickerson*, 120 S.Ct. at 2335, 2336

Since *Miranda* has always been a constitutionally based decision this understanding has informed the decisions subsequent to it. Subsequent cases were decided based on the belief and understanding that *Miranda* warnings were constitutionally required, albeit the warnings were not the same as the provisions of the Fifth Amendment. *Dickerson*, 120 S.Ct. at 2335. The *Dickerson* majority acknowledged that language in some decisions after *Miranda* suggested that the *Miranda* warnings did not enjoy constitutional status, but rejected this analysis. *Dickerson*, 120 S.Ct. at 2332-33, 2335. Thus, the interpretation that *Dickerson* modified *Elstad* has been, at least implicitly, rejected. Although not explicitly stated, the Court in *Elstad* knew that *Miranda* was a constitutional

decision. The *Dickerson* decision merely clarifies the language in preceding cases.

Alternatively, the *Dickerson* decision can be viewed as causing a sea change in constitutional interpretation. The dissent in *Dickerson* certainly proposes that just such a change has occurred:

> Those who understand the judicial process will appreciate that today's decision is not a reaffirmation of *Miranda*, but a radical revision of the most significant element of *Miranda* . . . *Dickerson*, 120 S.Ct. at 2337.

Even if the dissent is correct, Tankleff still cannot prevail because federal habeas corpus is not available if the claim rests upon a new rule of constitutional law announced or created after the petitioner's direct state appeal became final. If *Elstad* must be interpreted differently because of *Dickerson* then a new rule would be collaterally applied to this case. A new rule breaks new ground or imposes a new obligation on the state if the result is not dictated by precedent. *Teague v. Lane*, 489 U.S. 288, 301 (1989). "Subject to two exceptions, a case decided after a petitioner's conviction became final may not be the predicate for federal habeas corpus relief unless the decision was dictated by precedent existing when the judgment became final." *Stringer v. Black*, 503 U.S. 222, 227 (1992). A decision is final when the time to petition for certiorari on direct review expires. *Griffith v. Kentucky*, 479 U.S. 314, 321, n.6 (1987). Here, Tankleff's direct appeal ended on December 22, 1994. *People v. Tankleff*, 84 N.Y.2d 992 (1994). His direct appeal became final in early 1995.

A three-step analysis is employed to assess whether a new rule is being applied to collateral review. First, the court ascertains when direct review became final. Second, the court determines whether the rule is new; that is, does the petition seek to employ a rule that was not dictated by precedent at the time the petitioner's conviction became final. Third, the court determines if either of the two exceptions apply. *Caspari v. Bohlen*, 510 U.S. 383 (1994). Here, if the dissent in *Dickerson* is correct, there has been a radical revision of the law which would not apply to this case.

The two exceptions to *Teague* analysis are when a new rule places conduct beyond the reach of the criminal law or removes a class of defendants from a certain type of punishment (*Teague*, 489 U.S. at 307; *Sawyer v. Smith*, 497 U.S. 227 [1990]); or when a new groundbreaking, watershed rule of procedure is announced. *Caspari*, 510 U.S. at 396. Neither exception is applicable to this case.

Tankleff's reference to *Dickerson* does not reinforce his certiorari petition. *Dickerson* merely declared that *Miranda* itself established the constitutional basis for the required warnings. Cases following *Miranda* were decided with this understanding even if the language used in those cases was somewhat inaccurate. On the other hand, if *Dickerson* did radically change the legal landscape, Tankleff cannot rely on that new rule of constitutional law in the collateral proceeding.

CONCLUSION

FOR THESE REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

DATED: Riverhead, New York

September 29, 2000

Respectfully submitted,

MICHAEL J. MILLER*
STEVEN A. HOVANI
Of Counsel to
JAMES M. CATTERSON, JR.
District Attorney of Suffolk County
Criminal Courts Building
200 Center Drive
Riverhead, New York 11901
(631) 852-2500

Attorneys for Respondents
**Counsel of Record*